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U.S. Citizenship  
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MAR 29 2004

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

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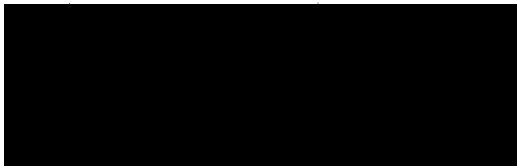
Applicant:



APPLICATION:

Application for Permission to Reapply for Admission into the United States after  
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and  
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application for permission to reapply for admission after removal was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala who entered the United States without inspection on March 19, 1995. On December 16, 1995 the applicant was found deportable under section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1231 and on April 17, 2000 he was removed to Guatemala. The applicant married a naturalized U.S. citizen on February 2, 1997, and he is the beneficiary of an approved petition for alien relative. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to travel to the United States to reside with his U.S. citizen spouse and child.

The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. See *Director Decision* dated August 4, 2003.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception. - Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' reapplying for admission.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens

who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

To recapitulate, the record reflects that the applicant first entered the United States without inspection on March 19, 1995 and in June 1995 he applied for asylum. The applicant was interviewed for asylum status on July 14, 1995, by the Immigration and Naturalization Service (now known as Citizenship and Immigration Services, (CIS)) and he was referred to an immigration judge for a court hearing. The record further reflects that the applicant was denied asylum status by an immigration judge on November 7, 1995 and was granted voluntary departure until February 2, 1996. The applicant did not depart the United States and he appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On February 13, 1998 the BIA dismissed the appeal and the applicant was granted 30 days to voluntarily depart the country. The applicant did not depart the United States. He filed a Petition for Review before the Ninth Circuit Court of Appeals on November 5, 1999, which was denied on February 24, 2000. The applicant was convicted on July 12, 1996 of theft of property and on September 24, 1998 of drunk driving on a highway. On September 11, 2000 the applicant attempted to procure admission into the United States at the Los Angeles International airport by fraud and willful misrepresentation of a material fact. He presented a photo-substituted passport with a photo-substituted nonimmigrant visa. Based on the applicant's previous removal he was processed for expedited removal pursuant to section 235(b)(1) of the Act for violation of sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Act.

On appeal, the applicant submits a brief in which he asserts that CIS erred in denying the Form I-212 application. In his brief counsel states that the applicant's convictions for theft and driving under the influence are two isolated instances of breaking the law and these convictions do not make him inadmissible to the United States. Counsel further states that the applicant's U.S. citizen spouse and child will suffer extreme hardship if the applicant is not permitted to travel to the United States. Additionally counsel states that since the applicant completed a rehabilitation program the application for permission to reapply after removal should be approved.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

*Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] . . . . In all other instances

when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9<sup>th</sup> Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5<sup>th</sup> Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

Based on the evidence in the record, the applicant's spouse should reasonably have known at the time of her February 2, 1997, marriage, that the applicant had been denied asylum, ordered removed by an immigration judge and granted voluntary departure until February 2, 1996.

The favorable factors in this matter are the applicant's marriage to a U.S. citizen and the fact that he is the father of a U.S. citizen.

The unfavorable factors in this matter include the applicant's overstay after he was granted voluntary departure, his lengthy presence in the United States without authorization, his criminal record and his attempt to reenter the United States by presenting a photo substituted passport and visa. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen, gained after a deportation order was issued and after he failed to depart the United States can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.